

JOSEPH P. RUSSONIELLO (CABN 44332)
United States Attorney

BRIAN J. STRETCH (CABN 163973)
Chief, Criminal Division

OWEN P. MARTIKAN (CSBN 177104)
Assistant United States Attorneys

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: (415) 436-7241
Facsimile: (415) 436-7234
owen.martikan@usdoj.gov

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
DONALD CLYBURN,)
)
Defendant.)

No. CR 07-0473 PJH

**THE UNITED STATES' MOTION FOR
REMAND UNDER 18 U.S.C. § 3143(a)(2)**

INTRODUCTION

On February 27, 2008, defendant Donald Clyburn will plead guilty to possessing child pornography in violation of 18 U.S.C. § 2252(a)(4). The purpose of this motion is to request that Clyburn be detained after the Court accepts his plea, as 18 U.S.C. § 3143(a)(2) requires.

ARGUMENT AND AUTHORITIES

I. THE COURT MUST REMAND CLYBURN UPON FINDING HIM GUILTY.

Because the statute criminalizing the possession of child pornography, 18 U.S.C. § 2252(a)(4), is contained within Chapter 110 of Title 18, that crime is considered a “crime of

1 violence” under 18 U.S.C. § 3156(a)(4)(C). The relevance of this definition to Clyburn’s
 2 detention upon change of plea is that 18 U.S.C. § 3143(a)(2) requires the Court to remand
 3 Clyburn into custody upon finding him guilty of violating 18 U.S.C. § 2252(a)(4), subject to two
 4 statutory exceptions (set forth in subsections (A)(i) and (A)(ii)) that on their face do not apply
 5 here.

6 **II. NO EXCEPTIONAL REASONS JUSTIFY CLYBURN’S RELEASE PENDING**
 7 **SENTENCING.**

8 Notwithstanding the mandatory language in 18 U.S.C. § 3143(a)(2), this Court has the
 9 authority to release Clyburn pending the execution of his sentence if it finds “exceptional
 10 reasons” why detention under 18 U.S.C. § 3143(a)(2) would not be appropriate. 18 U.S.C. §
 11 3145(c).¹

12 The Court should not find exceptional reasons to release Clyburn after his conviction.
 13 Though the Ninth Circuit has acknowledged the “broad discretion” that district courts possess in
 14 determining whether “exceptional reasons” to postpone detention exist, it has noted that district
 15 courts should focus on “truly unusual factors” that would make it unreasonable to incarcerate a
 16 defendant pending appeal (or here, execution of the sentence). *United States v. Garcia*, 340 F.3d
 17 1013, 1019 (9th Cir. 2003).

18 Clyburn has yet to produce any evidence of truly unusual factors that warrant his release
 19 following the entry of his guilty plea. The United States anticipates that Clyburn may argue that
 20 he has unusual security needs because of his status as a retired police officer, and because of the
 21 sexual nature of his offense. The Court should reject these arguments. First, Clyburn’s fear of
 22 retaliation in prison is not unusual: every cooperating witness – and there are many – faces this
 23 threat, and the defendants in *Garcia*, who were both former correctional officers, did not even
 24 raise this argument as an “exceptional reason” to avoid detention pending appeal. In *United*
 25 *States v. Douglas*, 824 F.Supp. 98, 99 (N.D. Tex. 1993), the district court rejected the
 26 defendant’s argument that his fear of retaliation was an exceptional reason to release him

27
 28 ¹ The United States does not contend that Clyburn cannot meet the requirements of 18
 U.S.C. § 3143(a)(1), and 18 U.S.C. § 3143(b)(1) does not apply here, as there is no appeal.

1 pending sentencing. The district court noted that this risk is not exceptional, given the number of
 2 cooperating witnesses who face incarceration. *Id.* Moreover, prisons have the ability to
 3 segregate and protect particularly vulnerable inmates.

4 Clyburn's fear of retaliation due to the nature of his offense – if he raises this argument –
 5 is similarly unexceptional. Indeed, were the Court to consider a sex offender's fear of retaliation
 6 as an exceptional reason to allow his release pending sentencing, then it would eviscerate the
 7 statutory language defining sexual offenses as crimes of violence that require detention pending
 8 sentencing. *See* 18 U.S.C. §§ 3143(a)(2), 3156(a)(4).

9 The United States does not have any information about a specific medical condition that
 10 Clyburn may claim as an exceptional reason to release him pending sentencing. The Ninth
 11 Circuit has held that a “severely ill or injured defendant” may have exceptional reasons to
 12 postpone detention if “maintaining an uninterrupted course of treatment” with a particular
 13 physician is particularly relevant. *Garcia*, 340 F.3d at 1019-20. This argument should also be
 14 balanced against the availability of medical treatment in prison. Because Clyburn has yet to
 15 present evidence of a medical condition that would render detention pending sentencing
 16 “unusually harsh,” the United States would appreciate the chance to respond if he does so.

17 CONCLUSION

18 The Court should find that upon the acceptance of his guilty plea, Clyburn will be subject
 19 to the mandatory detention provision of 18 U.S.C. § 3143(a)(2), and that he cannot show the
 20 exceptional reasons to avoid detention that would justify his release under 18 U.S.C. § 3145(c).

21 DATED: February 13, 2008

Respectfully submitted,

22 JOSEPH P. RUSSONIELLO
 23 United States Attorney

24 /s/ Owen Martikan
 25 OWEN P. MARTIKAN
 26 Assistant United States Attorney
 27
 28